Office Supreme Court U. S.
FILED
MAR 14 1900
JAMES H. McKENNEY,
Clerk.

No. 453.

Brf. of Warburton for D. C.

Filed Mar. 14, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 453.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

GEORGE E. HILL, HELEN K. HILL, AND E. C. HILL ET AL., BY THEIR GUARDIAN, EBEN SMITH, DEFENDANTS IN ERROR.

S. WARBURTON,
Attorney for Defendants in Error.

EBEN SMITH, *Of Counsel.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-14-1900

IN THE

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vs.

GEORGE E. HILL ET AL., DEFENDANTS IN ERROR.

STATEMENT.

In this brief we will only call the court's attention to the points of difference between this case and the Sears, and will only discuss those points of law wherein it differs from the Sears case.

This case differs from the Sears case in the following:

1. THERE IS NO PRETENSE OR CLAIM UP TO DATE THAT THE STATUTE OF 1897 HAS ANY APPLICATION TO THIS CASE. IN FACT, THIS ACTION WAS BEGUN IN 1895, TWO YEARS BEFORE THE PASSAGE OF THE ACT OF 1897.

2. THE POLICY WAS PAYABLE TO THE WIFE AND MINOR CHILDREN, WHO WERE THE REAL PARTIES IN INTEREST IN THE CONTRACT, AND THE ALLEGED DEFENSE OF ESTOPPEL CANNOT AFFECT THEM. IT IS NOT CLAIMED THAT THEY DID OR SAID ANYTHING TO ESTOP THEM FROM ENFORCING THE POLICY.

ARGUMENT.

I.

NEW YORK WAS THE PLACE OF CONTRACT, AND THE STATUTE OF 1877 WAS A PART OF THE CONTRACT.

In this case, as in the Sears, the contract was to be wholly performed in New York. The stipulation in the application contained the following agreement:

"*And the contract of insurance when made shall be held at and construed at all times and places to have been made in New York.*"

Our brief in the Sears case, pages 4–13, inclusive, fully covers the argument on this point, if any be needed, in view of the admission made by plaintiff in error on page 72, inclusive, in its Cohen brief, its principal brief in the argument of the Sears, Cohen, and Hill cases, as follows:

"Cohen defaulted June, 1893, 1894, 1895, 1896. No notice having been sent the policy was not forfeited. This was the condition of things on June 10, 1896, and would have continued unless the legislature had intervened. During 1896 Cohen could at any time have paid up his premiums with interest, and restored his policy. *He had no other rights.* By the terms of his contract it was forfeited, but the statute as to notice held this forfeiture as it were in suspense. It did not relieve him from the obligation to pay his premiums. It simply prevented the contracted effect of non-payment from taking place. There was no vested right in this effect. Cohen could say I paid no premium, but you have sent no notice, therefore my contract cannot be forfeited for that non-payment. We must admit that but for the act of 1897 the Cohen policy could not be forfeited for non-payment of the premium of June, 1896, until the statute of limitations had run, and it is not now important to determine whether that statute was the legal or equitable statute."

II.

THE STATUTE OF 1877 WAS A LIMITATION ON THE POWER OF THE CORPORATION TO FORFEIT CONTRACTS OF INSURANCE, EXCEPT IN CONFORMITY TO THE METHOD PROVIDED BY THE ACT.

This point is fully covered on pages 13–30, inclusive, Sears' brief.

III.

THE STATUTE COULD NOT BE WAIVED BY AN EXPRESS PROVISION OF THE POLICY TO THAT EFFECT.

This point is also fully covered in the Sears brief, pages 31–40, inclusive.

IV.

IT WAS NOT NECESSARY TO ALLEGE OR PROVE THE PAYMENT OF THE PREMIUMS. IT WAS NOT NECESSARY TO ALLEGE OR PROVE THE STATUTE OF NEW YORK; NEITHER WAS THERE A DEPARTURE FROM LAW TO LAW.

This point is fully covered by the argument in the Sears brief, pages 111–121, inclusive.

V.

THE PLAINTIFF IN ERROR DID NOT PLEAD AN ESTOPPEL IN EITHER TWO OF ITS AFFIRMATIVE DEFENSES, NOR CAN AN ESTOPPEL OR WAIVER BE PREDICATED ON FACTS WHICH WOULD ORDINARILY AMOUNT TO A WAIVER IF CONTRARY TO A STATUTE OR PUBLIC POLICY LAW.

These points are fully covered in the Sears brief, pages 40–111, inclusive.

VI.

THE ALLEGED DEFENSE OF ESTOPPEL CANNOT PREVAIL AGAINST BENEFICIARIES, DEFENDANTS IN ERROR; CONDUCT OF MR. HILL WOULD NOT ESTOP THEM.

The company insists that by the alleged conduct of Mr. Hill subsequent to the issuance of the policy Mr. Hill waived the service of the statutory notice and the beneficiaries are estopped from enforcing the contract.

Counsel for plaintiff, in its brief in this case, makes the following argument against this proposition. We quote its argument:

"The question is not whether Hill could surrender a live policy without the wife's or children's consent. This policy was lapsed and forfeited by its terms, and by such terms the wife and children had no interest. The lack of notice to Hill himself is claimed to keep it alive, and the only question is whether the person entitled to notice may not so conduct himself as to render lack of notice to *him* inoperative. Hill was under no obligation to his wife and children to pay the premium, and likewise he could be under no obligation to them to do or abstain from doing anything which would render the lack of notice operative or inoperative" (plaintiff in error's brief, Hill case, p. 19).

Probably, so far as the defendant in error is concerned, as forcible an answer as can be made is to quote from the plaintiff in error's brief in the Phinney case, now before this court. Speaking of this same question of estoppel (the same attorneys appear on the cover of the brief in that case), it admits that such a defense cannot prevail against a beneficiary, for under the following heading—

("THE DEFENDANT IN ERROR IS ESTOPPED FROM ASSERTING ANY CLAIM UNDER THE POLICY IN SUIT, FOR THE REASON THAT HER TESTATOR HAD ABANDONED AND SURRENDERED

THE POLICY AS AN EXISTING CONTRACT LONG BEFORE HIS DEATH "—Phinney Brief, p. 143)—

it says:

"This might not apply to cases where one has insured his life for another's benefit, for, as was said in Griffith *vs.* Ins. Co. (101 Cal., at p. 638), 'the doctrine is well settled that when a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance on his own life, payable to another, the insured cannot surrender the policy without the consent of the beneficiary.'"

Phinney brief, plaintiff in error, p. 143.

This quotation from the Phinney brief is the well-settled law; the one from the Hill brief is not. Mrs. Hill, the first beneficiary, had a right to pay the premium at any time before default according to the contract and the statute taken together. The *minor children* or any one in their behalf had a like right to pay the premium at any time before legal default. This right could not be taken from any one of them by the express contract of Mr. Hill, much less in the manner suggested by the answer. Their right to pay before default, as a fact (not what Mr. Hill might say about it), could not be taken from them, at least from the minor children, except by order of court, through their guardian. It is a fact, as appears by the complaint, that Mrs. Hill died before her husband, Mr. Hill; that fact only emphasizes the claim we make that a minor's interest in a contract could not in any manner be impaired by the statements of some third party. The following authorities fully sustain our claim as well as the statement of law quoted above from the brief of plaintiff in error in the Phinney brief.

This court has well stated the rule as follows:

"And it is a general rule that a policy and the money that may become due under it belong the moment it is

issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment, or will, to surrender the policy and issue a new one, or by other act, to transfer to any other person the interest of the person named."

Wash. Bank *vs.* Hume, 128 U. S., 195, on p. 207.

Mr. Bacon, in his admirable work on Insurance, says:

"When a policy of insurance is taken out payable to some other person than the assured, the beneficiary ordinarily has a vested right in the policy and in its proceeds, consequently the assured cannot in any way control or dispose of the policy. A leading writer on the subject says (Bliss on Life Ins., 318): 'We apprehend the general rule to be that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else.' And this statement is cited and approved by the supreme court of Indiana (Hanley *vs.* Heist, 86 Ind., 196; Am. Rep., 286; Holland *vs.* Taylor, 111 Ind., 121). In a case arising in Massachusetts, where, in pursuance of an understanding with the mother of the insured, he took out a policy payable to her, but, upon his subsequent marriage, surrendered it and received a new one payable to the wife, it was held that the mother's rights were not affected. In this case (Pingrey *vs.* National Life Ins. Co., 144 Mass., 381; 11 N. East. Rep., 111 Ind., 121), the court said: 'There appears to have been a full understanding between him (the assured) and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact it was made payable to her, and this was done with the intention of giving her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it

from being a good trust. An unrevoked trust is valid, even though there is an express power of revocation' (Stone *vs.* Hachett, 12 Gray, 227). In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two full annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under the circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority," citing numerous authorities.

Bacon on Ins., vol. 1, sec. 292.

To the same effect is Mr. May's text on the same question:

"A life policy and the money to become due under it belong the moment it is issued, to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment, or will, to surrender the policy and issue a new one, or by other act, to transfer the interest to any one else. This right cannot be affected by any acts of the assured subsequent to the issue of the policy, except it be a breach of the condition. * * * No admissions of the assured subsequent to the policy are admissible against the beneficiary."

May on Insurance, 3d ed., sec. 399, L.

"While the beneficiary lives no surrender of the policy without his assent, or non-payment of the premium after such surrender will defeat his right. A surrender of the policy by the husband for the wife is ineffectual if without her authority, * * * and although the policy may be forfeited for non-payment of premiums, yet non-payment of premiums after such an attempted wrongful surrender, without notice to the beneficiaries will not ferfeit the policy."

May on Insurance, 3d ed., sec. 399, P.

"Declarations made by insured concerning his health after the policy has been issued on his life payable to a third party, as, for example, to his wife, are not competent in an action brought by such payee on the policy, because the contract is made with the beneficiary and not with the party whose life is insured."

2 Bacon, Ben. Soc. and Life Ins., sec. 460.

"These declarations were all mere hearsay and cannot be used as against the plaintiffs. The insured, who made them, had no interest in the policy, most if not all these declarations having been made long before the policy was issued. Even if made afterwards, they were equally mere hearsay; he never did have any interest in the policy."

Schwarzbach *vs.* Pro. Union, 25 W. Va., 622, 648.

Statements and admissions of the insured, made subsequent to the issuance of a policy in which his wife is beneficiary, to the effect that the statements made by him in the application were untrue, cannot be used against her.

"The statements in question, then, are the declarations of a stranger, one who is neither a party to the suit, nor was, at the time of making them, acting as the agent of a party. * * * They were not admissions against interest, for they could injuriously affect only his wife's separate property."

Fraternal M. L. I. Co. *vs.* Applegate, 7 Ohio St., 293, 297, 298.

"The offer of the defendants to prove the statements of Fish, made in the fall of 1853, in relation to his intemperate habits, was properly overruled. Fish was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. He was not, in any manner, the agent of the plaintiff, after the issuing of the policy, and so could not bind him. It might, with equal propriety, be pretended that the defendants could prove, by the admissions of Fish, that he had resided in forbidden districts, or engaged in occupations prohibited by the policy, and so escape payment. One class of unsworn state-

ments of Fish would be about as admissible as the other, to discharge the defendants from their contract."

Rawls *vs.* Ins. Co., 27 N. Y., 282, 290.

"Although there is some conflict in the authorities, the decided weight of them holds that no statements of the insured, made after the issuance of the policy, are receivable in evidence to contradict the written statements contained in his application, where the policy is issued for the benefit of another. The insured in such a case is not a party to the record, has no interest in the policy, and, if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases with its issuance, so that there is no legal ground upon which his statements can be received."

Grangers' Ins. Co. *vs.* Brown, 57 Miss., 308, 315.

To the same effect is the statement of Judge Brewer:

"The first and third points present the same question, and may be considered together. That question is this: Can the declarations of a party whose life is insured for the benefit of another, made long after the application and the contract, be received in evidence against the assured to impeach the truthfulness of the application? The contract is between the assured and the insurer. The parties are the same whether that which is insured is a human life or a building. There is this difference: that the life, being active, can by its conduct affect the contract even so far as to annul it, while the building, being inanimate and passive, has of itself no such power. But, aside from this, the rights and liabilities of the parties to the contract are the same. The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest inures to the assured. She is not his agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him."

Washington Ins. Co. *vs.* Haney, 10 Kansas, 395, 403.
See also Ins. Co. *vs.* Morris, 3 Lea (Tenn.), 101, 103, 104.

So if the court holds that the contract is dominated by the statute of 1877, that it cannot be waived by the parties by

stipulation to that effect in the contract, which is admitted in the Cohen brief of plaintiff in error, page 72, then surely we are entitled to an affirmance of the judgment, it being remembered that plaintiff in error says, page 70 of its brief, Cohen case:

"In the Hill case the policy was issued in 1886, and Hill died in December, 1890. *But the act of 1897 is not involved in the Hill case.*"

And of course it was not, because Mr. Hill died and the action was begun prior to the enactment of the statute of 1897. We respectfully submit that the judgment of the circuit court of appeals, as well as the judgment of the circuit court, should in all things be affirmed.

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